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July 12, 2006

VIA ELECTRONIC FILING

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room TWB-204  
Washington, D. C. 20554

Re: *Ex Parte* Notice, Petition of AT&T Corp. and Alascom, Inc. for  
Elimination of Conditions Imposed By the FCC on the AT&T-  
Alascom Merger, CC Docket No. 00-46

Dear Ms. Dortch:

On July 11, 2006, James Lamoureux and I, representing AT&T Alascom, met with Deena Shetler, Margaret Dailey, Steve Morris, William Kehoe, Gail Cohen and Ann Stevens of the Wireline Competition Bureau and Paula Silberthau and Diane Griffin of the Office of the General Counsel to discuss matters related to the above referenced proceeding.

We discussed the carrier to carrier services currently provided under Tariff 11 and the continuing need to provide those services via tariff. We reviewed the history of the requirement to tariff these services in the first instance and subsequent regulatory and legislative events up to and including the telecommunications provisions contained in section 112 of the Consolidated Appropriations Act of 2005.

We also discussed the general rule that carrier to carrier services may be offered by contract as well as tariff. Specifically, Section 211(a) of the Act states that "[e]very carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers." 47 U.S.C. § 211(a). A line of cases dating from the early 1970s holds that § 211 authorizes carriers to offer services or facilities provided exclusively to other carriers—including those provided as common carriage—by contract rather than tariff. In the seminal case interpreting § 211, the Third Circuit held that § 211(a) provides an exception to § 203(c)'s general tariff requirement.<sup>1/</sup> In particular, the court reasoned that Congress would not have required the filing of carrier-to-carrier contracts in § 211 unless it also had intended that carriers could prohibited from contracting with customer-users, we find no such directive barring

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<sup>1/</sup> *The Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3rd Cir. 1974); *cert. denied*, 422 U.S. 1026 (1975).



contractual relations between independent carriers.” Relying upon the phrase “unless otherwise provided by or under authority of this chapter” in §§ 203(c) and 211(a), the court held that “*carriers regulated by the Act may order their business relations by contract as well as by tariff.*” *Bell Tel. Co.*, 503 F.2d at 1277.

*Bell Telephone*’s analysis of the relationship between §§ 203 and 211 has been cited on a number of subsequent occasions and remains the law today.<sup>2/</sup> The D.C. Circuit discussed *Bell Telephone* extensively in a case that largely adopted that decision’s reasoning in the process of concluding that carrier-to-customer contracts *are* governed by § 203’s tariff filing requirement. *Am. Broad. Cos., Inc. v. FCC*, 643 F.2d 818, 924-25 (D.C. Cir. 1980). Moreover, the Supreme Court reached the same conclusion in dictum as the Third Circuit did in *Bell Telephone*, referring to “[§] 211’s authorization of services between carriers pursuant to contractual rates.”<sup>3/</sup> The Commission has also cited *Bell Telephone* on numerous occasions, both in general discussions of § 203’s tariffing requirement<sup>4/</sup> and, most recently, in rejecting a petitioner’s argument that tariff terms should supercede the terms of a carrier-to-carrier agreement.<sup>5/</sup>

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<sup>2/</sup> See, e.g., *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3rd Cir. 2003) (“Under the FCA, a carrier may conduct its business either by tariff or by contract.”).

<sup>3/</sup> *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 232 n.5 (1994). The majority explained that § 203(c)’s caveat that carriers can avoid the tariff requirement if “provided by or under the authority of this Act” referred to § 211’s exception for carrier-to-carrier contracts.

<sup>4/</sup> Further Notice of Proposed Rulemaking, *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445 ¶ 94-95 (1980) (“Section 203(c) provides that no carrier ‘shall’ offer service without a published schedule of charges as required by 203(a). But 203(c) expressly excepts this requirement where ‘otherwise provided by or under authority of this Act.’ . . . The ‘unless otherwise provided’ proviso of Section 203(c) has also been construed to permit provision of service without a tariff filing when it has been determined that use of contracts is permissible under the Act. Because Sections 201(b) and 211(a) acknowledge the use of contracts when carriers provide communications service to or in conjunction with other carriers, it has been held that tariffs need not be filed in those situations and that the terms of the contract prevail over a subsequently filed tariff. *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3rd Cir. 1974); *cert. denied*, 422 U.S. 1026 (1975). The touchstone of the *Bell* decision was the court’s finding that the Act clearly contemplated the use of either contracts or tariffs between carriers.”).

<sup>5/</sup> *Global NAPs Order*, 15 FCC Rcd. 20,665 ¶ 21 (2000). See also Order and Authorization, *In the Matter of the Applications Of Amcsc Subsidiary Corporation For Blanket License For 30,000 Mobile Earth Stations Rockwell International Corporation For Blanket License For 15,000 Mobile Earth Stations Geostar Messaging Corporation For Blanket License For 10,000 Mobile Earth Stations*, FCC 92-26, ¶ 14 (1992) (lease of space segment capacity on satellite may be done through contract because “Sections



Consistent with Section 1.1206 of the Commission's rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-captioned proceeding.

Sincerely,

A handwritten signature in dark ink, appearing to read "F. Simone".

cc: Gail Cohen  
Margaret Dailey  
Diane Griffin  
William Kehoe  
Steve Morris  
Deena Shetler  
Paula Silberthau  
Ann Stevens